No. 93-935

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In the Supreme Court of the United States

OCTOBER TERM, 1993

FREEMAN UNITED COAL MINING COMPANY, PETITIONER

v.

FAIRY DELL JONES, WIDOW OF DONALD L. JONES, DECEASED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

In adjudicating claims for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, the Department of Labor has long applied a "true doubt" rule, under which doubts on factual issues are resolved in favor of a claimant when the evidence is otherwise in equipoise. The question presented is whether use of the "true doubt" rule is permissible under Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d), and relevant Departmental regulations.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Mullins Coal Co. v. *Director, OWCP*, 484 U.S. 135 (1987)	2, 3, 6
NLRB v. *Transportation Management Corp.*, 462 U.S. 393 (1983)	6
Pauley v. *BethEnergy Mines, Inc.*, 111 S. Ct. 2524 (1991)	2
Steadman v. *SEC*, 450 U.S. 91 (1981)	6

Statutes, regulations and rule:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:	
§ 7(c), 5 U.S.C. 556(d)	6, 7
Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*	2
30 U.S.C. 923(b)	3, 5, 7, 8
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*	7, 8
20 C.F.R.:	
Section 727.203	2
Section 727.203(b)	2
Sup. Ct. R. 12.4	3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 988 F.2d 706, and a separate opinion on denial of rehearing (Pet. App. B1-B5) is reported at 999 F.2d 291. The decisions and orders of the Benefits Review Board (Pet. App. C1-C6) and the administrative law judge (Pet. App. D1-D4) are unreported. An earlier decision of the court of appeals (Pet. App. E1-E8) is reported at 879 F.2d 245, and an earlier decision of the Benefits Review Board (Pet. App. H1-H8) is reported at 3 Black Lung Rep. (MB) 1-153. Another earlier decision of the Benefits Review Board (Pet. App. F1-F5) is unreported, as are

earlier decisions of the administrative law judge (*e.g.*, Pet. App. G1-G2, I1-I4).[1]

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1993, and a petition for rehearing was denied on August 4, 1993. On October 28, 1993, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including December 10, 1993, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1978, Donald L. Jones filed an application with the Department of Labor for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* Pet. App. E2. In 1980, an administrative law judge (ALJ) denied benefits under the Department's then-applicable "interim presumption" regulation.[2] *Id.* at I1-I4. The

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[1] The ALJ's superseded or procedural opinions of Oct. 22, 1981; Nov. 5, 1981; Jan. 7, 1983; and April 20, 1983 are not reprinted in the appendix to the petition. See Pet. App. E2-E4.

[2] The interim presumption regulation, 20 C.F.R. 727.203, applies to claims filed with the Department of Labor before April 1, 1980, and affords a presumption of eligibility to a miner who has at least ten years of coal mine employment and meets one of four medical requirements. See *Pauley* v. *BethEnergy Mines, Inc.*, 111 S. Ct. 2524, 2528-2529 (1991); *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 139 (1987). Once invoked, the regulation provides four methods by which the party contesting entitlement can rebut the presumption. See 20 C.F.R. 727.203(b); *Pauley*, 111 S. Ct. at 2530.

ALJ reasoned that the claimant,[3] who had worked for petitioner Freeman United Coal Mining Co. for approximately 45 years, had failed to provide the medical evidence necessary to invoke the regulation's presumption of eligibility. *Id.* at I2-I3. Among other things, the ALJ concluded that the claimant had not established the presence of pneumoconiosis by x-ray, one of the methods for invocation, because a January 1979 x-ray that had been read as positive for the disease had later been reread as negative. *Id.* at I2. The ALJ accepted the rereading "in reliance upon [the rereader's] credentials as a Certified B Reader." *Ibid.*[4]

In a 1981 decision, the Benefits Review Board reversed. Pet. App. H1-H8. It reasoned that 30 U.S.C. 923(b) prohibited the ALJ from relying on a rereading obtained by the Director of the Office of Workers' Compensation Programs. Pet. App. H5-H6. The Board remanded the case with instructions to allow the claimant and employer to present additional evidence. *Id.* at H6-H7.

On remand, the ALJ initially awarded benefits. See Pet. App. E2. That decision was later suspended. See *id.* at E2-E3. On reconsideration the ALJ first again awarded benefits (see *id.* at E3), but shortly there-

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[3] Donald Jones died in 1981. Pet. 5 n.1. His widow, Fairy Dell Jones, was the respondent in the court of appeals, see Pet. App. A1, and is the proper respondent in this Court. See Sup. Ct. Rule 12.4. For simplicity, we use the term "claimant" to refer to both the miner and his widow, as appropriate.

[4] B-readers are physicians who have been specially certified as having demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis. See Pet. App. E3 n.2; *Mullins*, 484 U.S. at 145 n.16.

after withdrew that decision and denied benefits because a new negative rereading of the January 1979 x-ray had been obtained directly by petitioner, rather than by the Director. *Id.* at G1-G2. The ALJ had earlier concluded that a contrary positive rereading of the same x-ray submitted by the claimant was untimely (see *id.* at E3), and subsequently denied a motion for reconsideration on the same ground (see *id.* at E4).

On a second appeal, the Benefits Review Board reversed (Pet. App. F1-F5), holding that the ALJ had erred in excluding the claimant's post-remand submission and that that submission, together with the positive reading of the x-ray that was already in the record, properly invoked the Department's interim presumption regulation. *Id.* at F4. Because the evidence was insufficient to rebut the presumption, the Board ordered the payment of benefits. *Id.* at F4-F5. Petitioner then sought review in the United States Court of Appeals for the Seventh Circuit. That court, in a 1989 decision (*id.* at E1-E8), directed the Board to vacate its decision and remand the case for the ALJ to weigh all three readings of the January 1979 x-ray and to articulate the basis for his decision. *Id.* at E7-E8.[5]

On the second remand, the ALJ awarded benefits. Pet. App. D1-D4. He disregarded one of the positive

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[5] The court of appeals agreed with petitioner that the Board cannot perform the ALJ's function of weighing evidence. Pet. App. E7. Petitioner did not seek review of the Board's holdings that the ALJ had improperly excluded the claimant's additional x-ray reading and that the claimant's motion for reconsideration of the ALJ's 1983 denial of benefits was timely. *Id.* at E4.

readings, because the reader was not as qualified as the other two readers. *Id.* at D2. Left with two readings of the same x-ray—one positive and one negative—by equally qualified readers, the ALJ found the evidence equally balanced, and thus concluded that "true doubt" existed as to whether the x-ray was positive for pneumoconiosis. Resolving that doubt in favor of the claimant, the ALJ held that the x-ray evidence invoked the interim presumption under the regulations. *Ibid.* Finding no evidence in the record to support rebuttal, the ALJ awarded benefits. *Id.* at D2-D3.

The Benefits Review Board affirmed. Pet. App. C1-C6. It reasoned that the ALJ properly invoked the interim presumption because, although the claimant generally bears the burden of proving facts necessary for invocation, the Seventh Circuit and the Board had consistently recognized that "whenever there is equally probative but contradictory evidence with respect to a particular * * * element of entitlement, all doubts must be resolved in favor of [the] claimant." *Id.* at C4-C5. The Board also upheld the ALJ's finding that the employer had not rebutted the interim presumption. *Id.* at C6 n.2.

The court of appeals affirmed. Pet. App. A1-A10. It concluded that use of the "true doubt" rule was consistent with congressional intent that, in the absence of definitive medical conclusions, the Black Lung Benefits Act be construed in favor of disabled miners and their survivors. *Id.* at A5-A6. The court also noted that it and other courts of appeals had "endorsed the true doubt rule as a means of breaking evidentiary gridlock in black lung cases." *Id.* at A6.

The court rejected petitioner's argument that the "true doubt" rule violates Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. 556(d), which states that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."[6] The court reasoned that Section 7(c) imposes on a benefits claimant only a burden of production, not the burden of persuasion. Pet. App. A8 (citing *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 404 n.7 (1983)). The court held that the claimant had satisfied that burden by producing x-ray evidence of pneumoconiosis. Pet. App. A8. It rejected (*id.* at A8-A9) petitioner's argument that the "true doubt" rule contravenes *Steadman* v. *SEC*, 450 U.S. 91 (1981), which held that Section 7(c) requires the party who bears the burden of persuasion to establish its position by a preponderance of the evidence. Because the "true doubt" rule in effect assigns the burden of persuasion to the employer, the court found no conflict between the rule and the holding in *Steadman*. Pet. App. A9.

Finally, the court found use of the rule to be consistent with *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135 (1987), which held that a claimant cannot automatically invoke the regulatory interim presumption by presenting any one item of qualifying evidence, but instead must prove the facts necessary for invocation by a preponderance of the evidence. Pet. App. A9. The court pointed out that *Mullins*

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[6] The court considered that argument despite the claimant's contention that petitioner had waived it by failing to raise it before the Board. Pet. App. A4 n.3. The court also concluded that the APA applies to black lung adjudications. *Id.* at A7 n.6.

acknowledges use of the "true doubt" rule, and "[f]ar from casting doubt" on the rule, "treats the rule as a reasonable interpretation of the regulations." *Id.* at A10.[7]

ARGUMENT

The question presented in this case is the same as that presented in the pending petition in *Director, OWCP* v. *Greenwich Collieries* and *Director, OWCP* v. *Maher Terminals, Inc.*, No. 93-744 (*Greenwich Collieries*), concerning the validity of the "true doubt" rule that the Department of Labor applies under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, and the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.*[8] In the decisions at issue in *Greenwich Collieries*, the Third Circuit held that the "true doubt" rule is inconsistent with Section 7(c) of the APA and the Department's current black lung regulations. In this case, the court of appeals held that the rule does not conflict with Section 7(c) and is not otherwise improper.

As we explain in the petition for a writ of certiorari in *Greenwich Collieries*, the "true doubt" rule is consistent with both the BLBA and the APA, and the

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[7] The court denied petitioner's petition for rehearing and suggestion of rehearing en banc. Judges Easterbrook and Posner questioned the panel's decision but did not vote for rehearing en banc because "[n]othing our court could do would resolve the tension in the Supreme Court's opinions or end the appellate discord about the true doubt rule." Pet. App. B5.

[8] The same question is also presented in *Santoro* v. *Maher Terminals, Inc.*, No. 93-474 (which also seeks review of one of the decisions involved in *Greenwich Collieries*), and in *Consolidation Coal Co.* v. *Skukan*, No. 93-964.

conflict among decisions of the courts of appeals regarding its validity warrants review by this Court. *Greenwich Collieries*, however, offers a better vehicle for review than does this case. The petition in *Greenwich Collieries* presents the question under both the LHWCA and the BLBA, and under the regulations applicable to BLBA claims filed on or after April 1, 1980. This case, in contrast, presents the question only under the BLBA, and involves only the interim presumption regulation applicable to claims filed before April 1, 1980. See note 2, *supra*. We therefore agree with petitioner that the Court should hold this petition pending disposition of the petition in *Greenwich Collieries*. See Petitioner's Motion to Hold Ruling on Petition for Certiorari in Abeyance (served Dec. 16, 1993).

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of the petition in *Director, OWCP* v. *Greenwich Collieries* and *Director, OWCP* v. *Maher Terminals, Inc.*, petition for certiorari pending, No. 93-744.

Respectfully submitted.

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